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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 63.

A. P. DICKSON, JOE DICKSON, I. N. CALVERT, C. T. DICKINSON AND ERNEST MILLER, PETITIONERS,

VS.

UHLMANN GRAIN COMPANY, A CORPORATION, RESPONDENT.

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

S. J. JONES,
Attorney for Petitioners.

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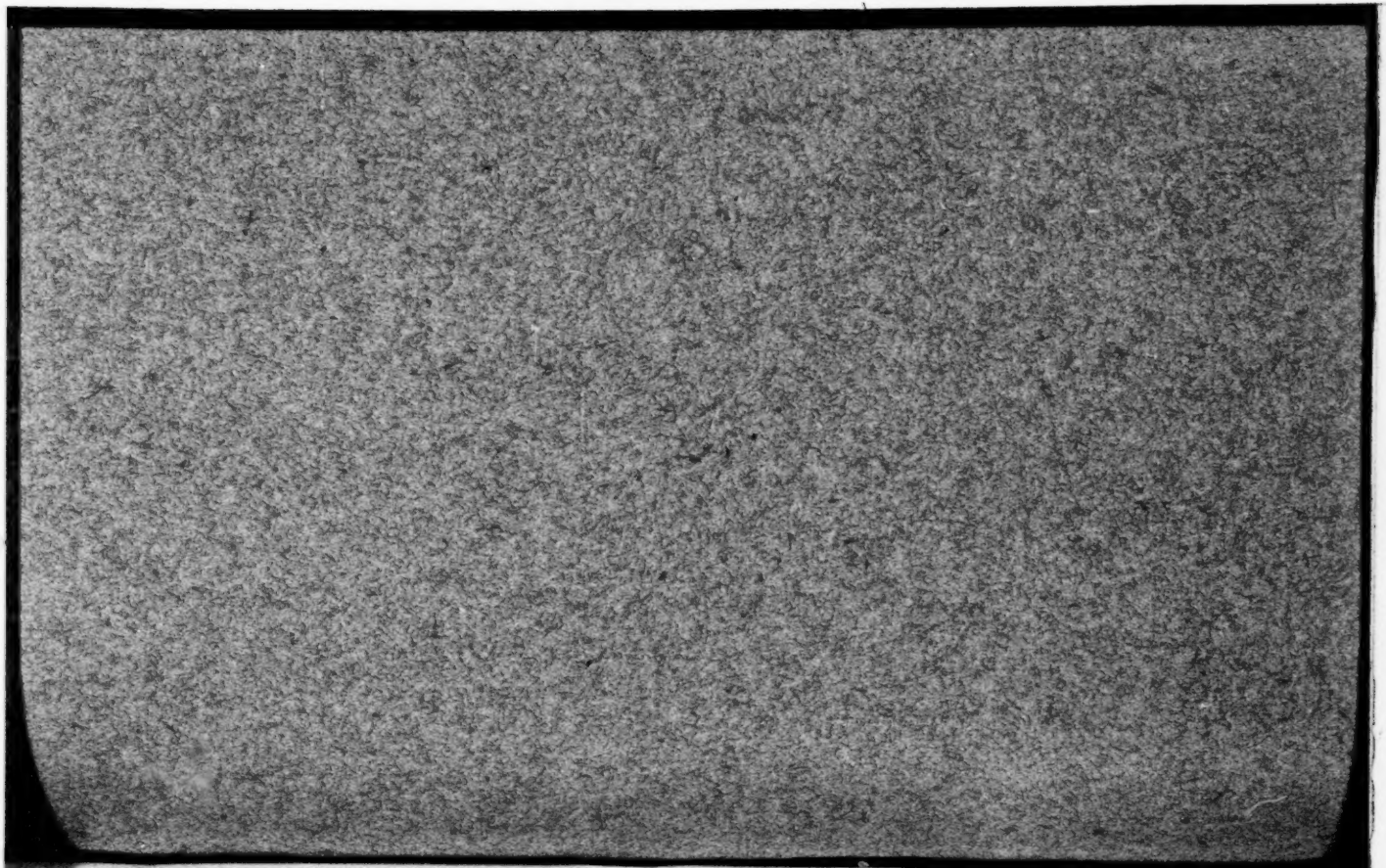

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UHLMANN GRAIN COMPANY, A CORPORATION, RESPONDENT.

STATEMENT OF THE CASE.

A concise statement of the facts is set out at pages 4, 5 and 6 of the petition for a writ of certiorari herein. We need only supplement the statement there by saying that the record plainly discloses that in all of the pretended transactions of purchase and sale of grain described in the record it was understood and agreed and intended by both petitioners and respondent that there should be no delivery of the grain purported to be bought or purported to be sold, but that instead

there should be a mere payment by one party to the other of the difference between the market price and the contract price. Mr. O. W. Rowe, Chief Clerk in respondent's (plaintiff's) Kansas City office testified (R. 68-69):

> "If a customer bought 10,000 bushels at a certain price, that would be the contract price. If it was sold for more than that he would have a profit. In determining whether or not he had a profit or a loss, you would take the price at which it was bought and the market price at which it was sold. That is the way it was done; the trades were all closed out. During the period when these defendant customers were operating we would call on them to put up money in the way of margins. This would be done if their account showed a loss at the time.
> "A. Well, if their account showed a loss at the time, between what they had bought it and what they had sold it, and the present markets, that would determine how much they owed us or how much we owed them.
>
> * * * * * * *
>
> "Q. Now, in a general way, what you have stated is the way these trades were carried on, all of them?
> "A. That is true; yes, sir."

E. S. McDonough, respondent's (plaintiff's) agent who opened and conducted respondent's office at Carrollton where all of the transactions involved were initiated, testified (R. 114-115):

> "It was determined whether or not these customers had money coming to them or owed us money by the difference in the price of the market and the price of the commodity in which they were

interested; the price at which it was bought and sold and prevailing price at the time the reckoning was made. That is to say, if they bought the grain on a certain date at a certain price and then sold later, and the price on the date on which they sold had advanced, they made a profit, and if it had gone down, if the trade was closed, it showed loss. Uhlmann Grain Company reserved the right to close the transaction at any time they wanted to without notice; that is, I think they did. I think that many times they acted on that authority; and I think they did so with reference to some of the customers at Carrollton. I do not say all of them. The majority of our customers at Carrollton were farmers. I have no recollection of any of them having taken delivery of the grain which they bought."

McDonough denied that there was any understanding that no grain was to be delivered.

Paul Uhlmann, vice president of respondent (plaintiff) testified (R. 139):

"When we settle with our customers, we ascertain the amount they were to pay or were to receive in this way. If they made a profit, we paid them what we owed them. The profit was ascertained after the transaction was closed out. We settled all differences between what the market when when they bought and what it was when they sold. That would determine our liability to them and their liability to us. If the fluctuations in the market showed an increase between the time they bought and the date they sold, that difference would represent their profit and what we owed them. These trades—of course, it was not just the difference in the prices—the trades—we actually have to pay the money to the Board of Trade."

T. H. Cramer, one of petitioners, testified (R. 155):

> "He (McDonough) explained how they done these things. He was talking about a spread at that time. I don't remember what spread it was, probably Winnipeg or Chicago spread, I think, and I had heard of people, you understand, tapping the market and I wanted to get the details. He explained that you could buy on one market and sell on another and make some money. I would find out whether I made money or not by the rise and fall of the market. If the market went in our favor you made money, and if it went the other way, you would lose money. After he made that explanation to me, well I says, 'Mac, I don't want to get into anything I will be reliable for; I don't want to get in anything that will get me caught with a big chunk of wheat.' He said, 'I will take care of that, you don't need to worry. I will see that you get out of that before time for delivery and will make you some easy money.' That was before I made any operation."

Amos (A. P.) Dickson, one of the petitioners, testified (R. 157) that he started speculating at the solicitation of E. S. McDonough. The witness testified (R. 157-158):

> "I speculated on the Board of Trade. I came to start it because he (McDonough) came in our place of business and solicited. I mean our store. He would tell about these trades or spreads and how to make some easy money, and I told him I couldn't take care of any wheat at all. 'Well,' he said, 'start in a small way,' so he bought me 5,000 bushels and we understood there would be no delivery and I couldn't pay for it because at the time I was obligated at the bank. I couldn't take any wheat at all. I told him that. He said, 'All right, you will never have to take it.' I

bought 5,000 bushels. I don't remember what Board of Trade he claimed to have bought it on."

Dickson explained to McDonough (R. 158) that he owed $4,000.00 at the bank, that he was not worth more than one-fourth of that amount, and that he was largely obligated to the wholesale houses. The witness knew nothing about trading and placed entire reliance on McDonough (R. 159).

It was stipulated between the parties (R. 167) that all of petitioners if called and sworn would deliver the same testimony as that of A. P. Dickson (Amos Dickson).

It appears from the testimony of O. W. Rowe, respondent's chief clerk (R. 29, *et seq.*), that the five petitioners here (defendants below) and S. P. Dickinson, also a farmer, altogether traded in a total of 3,035,000 bushels of grain (R. 135) in a period of about eight months—from March to November, 1924. The amounts traded in were as follows:

A. P. Dickson	555,000 bushels
I. N. Calvert	685,000 "
Joe Dickson	585,000 "
Ernest Miller	535,000 "
C. T. Dickinson	70,000 "
S. P. Dickinson	605,000 "

The record discloses that none of the petitioners ever received or delivered a single bushel of grain and the trial court so found (Finding of Fact No. 6, R. 187).

The trial court expressly found that all of the transactions of purchase and sale were fictitious, that none was actually executed between members of the exchanges; that in all of the transactions plaintiff bet with its customers and took the other side of the deal (Findings of Fact 10 and 11, R. 188).

It was one of E. S. McDonough's duties to solicit customers in Carrollton and accordingly he accumulated about fifty customers there (R. 70 and 152). Petitioners (defendants) in common with respondent's 45 other customers at Carrollton had no facilities for accepting delivery of and storing the wheat, which they purported to buy, nor were they financially able to accept delivery and pay for it. Neither were they financially able to purchase, pay for or deliver the grain which they contracted to sell; nor was any effort made by respondent to ascertain the financial standing of the petitioners or any of them. None of the petitioners was a grain merchant nor engaged in a line of business whereby he could make use of the grain (R. 102-147-154-158-165).

Mr. McDonough testified (R. 112-113):

> "I went outside the office to solicit. I solicited option business from Dickinson of Tina, and his two sons, and Tom Cramer. I mean Charles T. Dickinson and W. L. Dickinson and V. M. Dickinson. I also solicited A. P. Dickson and Joe Dickson, merchants in Tina. I talked business with them at various places, driving in their automobile, at their store, in my office, at the hotel, at my home where I was living, on the street. They approached me first. One of the

boys, Joe Dickson, approached me first. I think he approached me when we were riding in his automobile. I also solicited Tom Mobley and James C. Allemont. I also solicited that very prominent farmer in Tina, Ernest Miller. There were many others whose names I cannot recall. I met Allemont on the train going to Tina when I first came to Carrollton before we had really opened the office. We were engaged in conversation, engaged in conversation on generalities, and I introduced myself to him, he introduced himself to me. I had heard of him before as having been quite a speculator in grain. Before going there I had been given list of men who had speculated with other houses. I was given a list by a man in Bloomington who used to run an office in Carrollton. He was in the employ of Claiborne. The Claiborne Commission Company had an office there several years prior to that. This man gave me a list—knowing that I was going to Carrollton—he gave me a list of names to call upon, and most of these were included in that list.

"The only advice that I gave was recommendations that I received from my firm relative to spread transactions."

Respondent (plaintiff), the evidence shows, had full control and dominion over all transactions and exercised that control. Respondent exercised it by transferring the account from one trade month to another; many times it did this without the knowledge or consent of petitioners (R. 132-133-142). And at times respondent bought for petitioners without exacting additional margins (R. 133). "The whole matter was in our (respondent's) hands" (R. 147).

In all of the transactions that took place during the entire time the office of respondent was maintained at Carrollton and in all the statements of purchases and sales rendered to petitioners the name of the purchaser was not disclosed in those cases where sales were purported to have been made, nor was the name of the seller disclosed in those cases where it was claimed that petitioners made a purchase (R. 101-102).

Respondent exercised its right to close out the transactions and did so, for it is shown by the testimony of Mr. Rowe that respondent stood behind the deals itself. In some of the transactions petitioners had notes up instead of cash, while others had no margins at all. Respondent was carrying these transactions on its own responsibility and sustained losses in the last transactions (R. 181).

That respondent knew petitioners were speculating and gambling on the fluctuations of the market is well established by letters written by respondent to two of its Carrollton customers, namely, by a letter to Mr. R. A. Thompson dated November 12, 1924, in which respondent admitted in a sympathetic way the mistakes that had been made, and that "we are certainly awfully sorry that we got off so badly on this 'spread,' and it is really the first bad one we have had since we have been in the business." Then followed by stating that there was a good chance for improvement and advised a reduction in Mr. Thompson's holding, and proposed to handle the matter the best they could (R. 153).

Then, on November 13, respondent addressed a letter to Mr. I. N. Calvert, petitioner, one of its Carrollton customers, in which it expressed its sorrow that the Winnipeg spread turned out so badly and gave the assurance that at all times they would give their very best advice, and expressed the desire that Mr. Calvert would continue in the business and felt sure that they could help him regain his losses (R. 153-154).

Respondent reserved the right to close the account at any time it wanted to. So said Paul Uhlmann, vice president and manager of respondent's Kansas City office (R. 142). Also, that in these cases the men, meaning petitioners, wanted to carry their trades until they owed respondent a certain amount and then wanted to be closed out, and he did; that this condition was because of the fact that petitioners were indebted to respondent when the accounts were closed because they had lost money on their trades; "and in those cases where we have sued on the notes we have a book account of the items that make up the amount of the notes. In a good many cases the notes are for a larger amount than the people owed us. The notes were given to us just like money" (R. 142-143). The notes referred to are notes that petitioner C. T. Dickinson gave respondent. Some time before respondent closed its Carrollton office, Mr. C. T. Dickinson, one of the petitioners herein, being unable to further margin his deals, was advised by Mr. McDonough to go to Chicago and see Mr. Fred Uhlmann.

He followed that advice and went to Chicago and at the instance and suggestion of Mr. Fred Uhlmann

agreed to give notes and at the time Mr. Fred Uhlmann advised him to keep on trading; that in a day or two after this conversation and having returned home McDonough came to Tina, Missouri, at which time and place the notes were given; that at the time Mr. Uhlmann suggested the giving of the notes he was encouraged to keep on trading and was assured he would not get into any more losses; that if he did he would get him into another deal and work it out (R. 168-169).

Respondent offered evidence to the effect that the manner of conducting its transactions with its customers at its Carrollton office was that Mr. McDonough, its agent, received verbal orders for the purchase or sale of grain which were wired to its Kansas City office for approval or rejection, and that if the orders were accepted it then relayed or rewired the orders to some one of the grain exchanges for execution, and claimed that such orders were actually executed on some one of the boards of trade, after which it transmitted from its Kansas City office advice to that effect to its customers.

There was no documentary evidence offered at the trial showing that this procedure was adopted in the case of any Carrollton customer. The testimony simply describes what is claimed to be the general course of respondent's business illustrated by exhibits effecting transactions on contract markets with persons other than the customers at Carrollton. There were no exhibits offered in evidence showing who the grain was bought

from, if any was bought, nor to whom it was sold if any was sold (R. 56 to 100, incl.).

From the foregoing, as well as all the other facts appearing in the transcript of the record, the trial judge found in favor of the petitioners and rendered judgment accordingly, from which respondent in this case appealed to the Circuit Court of Appeals for the Eighth Circuit, where, in an opinion by Judge Gardner concurred in by Judge Van Valkenburgh, Judge Kenyon dissenting, the case was reversed and remanded for further proceedings on the principal ground that the transactions in evidence were lawful under the Grain Futures Act and that that Act superseded the Missouri statutes on the subject of bucket shops and grain gambling contracts. Thereupon this petition for a writ of certiorari was applied for to this court.

SUMMARY OF THE ARGUMENT.

I.

The transactions shown in evidence are illegal and void under the Missouri Bucket Shop Law.

Section 4317, Revised Statutes of Missouri 1929.

State v. *Kentner,* 178 Mo. 487, 77 S. W. 522.

State v. *Christopher,* 318 Mo. 225, 2 S. W. (2d) 621.

Smith v. *Bailey,* 200 Mo. App. 627, 209 S. W. 945.

Elmore-Schultz Grain Co. v. *Stonebraker,* 202 Mo. App. 81; 214 S. W. 216.

Stewart v. *Hutchinson,* 120 Mo. App. 32, l. c. 36, 96 S. W. 253.

Connor v. *Black,* 119 Mo. 126, l. c. 141, 24 S. W. 184.

Atwater v. *Brokerage Co.,* 147 Mo. App. 436, 126 S. W. 823.

Woolfolk v. *Duncan,* 80 Mo. App. 421.

McVean v. *Wehmeier,* 215 Mo. App. 587, 256 S. W. 1085.

Section 4318, Revised Statutes Missouri, 1929.

II.

The transactions shown in evidence are illegal and void at common law irrespective of the Missouri Bucket Shop Law.

Irwin v. *Williar,* 110 U. S. 499, 28 L. Ed. 225.

Embry v. *Jemison,* 131 U. S. 336, 33 L. Ed. 172.

Roundtree v. *Smith,* 108 U. S. 269.

Clews v. *Jamieson,* 182 U. S. 461, 45 L. Ed. 1183.

Gettys v. *Newberger,* 272 Fed. 209 (C. C. A. 8th), l. c. 217.

James v. *Clement,* 223 Fed. 385 (C. C. A. 5th).

Riordon v. *McCabe*, 173 N. E. 660 (Ill.).

Fenner v. *Boykin*, 3 Fed. (2d) 674, l. c. 684 (D. C. N. D. Ga.) Aff. 271 U. S. 240.

Wright-Blodgett Company v. *United States*, 236 U. S. 397.

Williamson v. *Majors*, 169 Fed. 754, l. c. 762.

McDaniel v. *Tullis Craig Co.*, 11 S. W. (2d) 203 (Texas) l. c. 205.

Seeligson v. *Lewis*, 65 Texas 215.

State v. *Christopher*, 318 Mo. 225, 2 S. W. (2d) 621.

McVean v. *Wehmeier*, 215 Mo. App. 587, 256 S. W. 1085 (Mo. App.), l. c. 1087.

Edwards Brokerage Co. v. *Stevenson*, 160 Mo. 516, 61 S. W. 617.

Elmore-Schultz Grain Co. v. *Stonebraker*, 202 Mo. App. 81, 214 S. W. 216.

III.

The Federal Grain Futures Act does not supersede the Missouri Bucket Shop Law or legalize wagering transactions which were theretofore illegal at common law.

A. The Right to Enact Legislation Restricting Gambling in Grain Futures Is Within the Police Power of the State of Missouri.

House v. *Mayes*, 219 U. S. 270, 55 L. Ed. 213.

C. B. & Q. Ry. Co. v. *Illinois*, 200 U. S. 561, 50 L. Ed. 596.

Booth v. *Illinois*, 184 U. S. 425, 46 L. Ed. 623.

B. The Missouri Bucket Shop Law Does Not Affect Interstate Commerce But Affects Only Acts Committed in Missouri, Which the Federal Grain Futures Act Does Not and Cannot Regulate.

State v. *Christopher*, 318 Mo. 225, 2 S. W. (2d) 621, *supra*.

C. A. King & Co. v. *Horton*, 156 N. E. 124 (Ohio).

Ware and Leland v. *Mobile County*, 209 U. S. 405.

Hill v. *Wallace*, 259 U. S. 44.

Fenner v. *Boykin*, 3 Fed. (2d) 674, Aff. 271 U. S. 240.

IV.

The findings of fact of the trial court numbered ten and eleven that the transactions between petitioners and respondent were fictitious transactions and that respondent bet with petitioners in those transactions, had the same effect as a verdict of the jury, and the Circuit Court of Appeals for the Eighth Circuit had no right to set its findings aside under the evidence in this record.

Fenner v. *Boykin*, 3 Fed. (2d) 674, Aff. 271 U. S. 240.

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Riordon v. *McCabe*, 173 N. E. 661 (Ill.).

McDaniel v. *Tullis Craig Co.*, (Texas) 11 S. W. (2d) 205.

V.

Respondent's reply below to petitioners' answer pleaded that the transactions upon which the right of recovery was based occurred on the Chicago and Minneapolis Boards of Trade in pursuance of, and in compliance with, the Federal Grain Futures Act. Respondent's evidence failed to make good its reply and the trial court properly found for petitioners upon the defense pleaded in their answer, even if the Grain Futures Act superseded the Missouri Bucket Shop Law with respect to interstate transactions.

Grain Futures Act, Secs. 6 & 7, Title 7, U. S. C. Ann. p. 10.

ARGUMENT.

I.

The transactions shown in evidence are illegal and void under the Missouri Bucket Shop Law (R. S. Mo. 1929, Secs. 4316 to 4326, inclusive, all of which are set out in the appendix to the petition for certiorari herein).

By the terms of Section 4317, R. S. Mo., 1929—

> "A bucket shop * * * is a place wherein the person carrying on the bucket shop, then and there, either as principal or agent, pretends to buy or sell, or goes through the form of buying and selling, to or for any other person or persons * * * grain, provisions and other commodities * * * at prices fixed or pretended to be fixed by trades or transactions made or offered to be made in same on boards of exchange or otherwise, but wherein there is in fact no actual purchase and sale, or sale and purchase of such commodity for or on account of the party or parties thereto."

The learned trial judge expressly found that the transactions here were "fictitious transactions." "None of them were actually executed between clearing members of the exchange where pretended to have been consummated."

And further found:

> "In all of the transactions plaintiff bet with its customers and took the other side of the deal" (Findings of Fact Nos. 10 and 11, R. 188).

The record amply sustains the trial court's finding.

In *State* v. *Kentner*, 178 Mo. 487, 77 S. W. 522, the defendant had an office in St. Joseph, Missouri, and a branch in Mound City in charge of an agent who there took orders for the purchase or sale of stocks and grain which were transmitted to the office at St. Joseph. These orders were protected by margins. At the Mound City office there was a blackboard on which prices were marked on the direction of the defendant by telephone from St. Joseph. Defendant also employed a solicitor to solicit business at Mound City. The court found that the transactions were fictitious and that the profits or losses were determined by the rise and fall in the market. The court held that the business was in violation of the Missouri Bucket Shop Law and that the pretended purchases were made at the defendant's place of business in Mound City, and therefore, that the violation of the statute occurred there.

In *State* v. *Christopher*, 318 Mo. 225, 2 S. W. (2d) 621, the facts were almost exactly like the facts in the present case. The action was a prosecution under the Missouri Bucket Shop Law. The case was submitted on an agreed statement of facts and so strikingly similar are they to the facts in the case at bar that we state in substance what they were, as follows:

That the defendant was a member of the boards of trade in Kansas City and Chicago and that such boards of trade were contract markets under the Federal Act.

That the defendant was engaged in the business of buying and selling grain on commissions for numerous customers for future delivery.

That the defendant maintained an office in Sedalia, Missouri, in charge of an agent; that defendant furnished market quotations for his Sedalia office over the telegraph wire from Kansas City, which as in this case were placed on the blackboard in the office.

That defendant's agent received orders for the purchase of grain to be executed on the Kansas City or Chicago Boards of Trade as directed by the customer.

That the agent transmitted such orders to Kansas City for acceptance.

That such orders if accepted were executed on the Kansas City Board of Trade or transmitted by wire for execution on the Chicago Board of Trade, the bulk of the business being done on the Chicago Board of Trade.

That after the execution of the trade the customer would be duly notified within a few days by mail of the trade, this being sent from defendant's Kansas City office. The transactions as in this case were all designated by number.

In short, Christopher had at Sedalia the same equipment that the respondent in this case had at Carrollton, and the dealing was done in the same way.

Practically all of the transactions were conducted on margin.

It was admitted that a large majority of the persons engaged in these trades were not engaged in the grain business, but were in the transactions for the purpose of speculative gain.

It was further admitted that there was no physical delivery of the grain, but all the trades were offset by subsequent sales or subsequent purchases, the same as plaintiff claims was done in this case.

It was further admitted that all orders received at Sedalia were actually executed by the defendant upon the exchange subject to the rules of the exchange. So claims the respondent in this case.

The orders which the court said were actually executed on the exchange subject to the rules of the exchange were confirmed by notice sent out from the Kansas City office; that notice of confirmation was exactly like the notice which was sent out to the customers in the case at bar.

The only element present in this case which was not expressly shown to be present in the Christopher case was testimony establishing an actual intention of the parties from the inception of the transactions not to make delivery of any of the grain purchased or purported to be purchased. The court in the Christopher case, however, inferred such an intent from the regular course of business in defendant's office and from the fact that none of the persons trading in defendant's office ordered or accepted delivery of the grain. From this custom it was found that the defendant had reason to believe that such was the intent of the customers. The court held that the

foregoing facts constituted a violation of the Missouri Bucket Shop Law under the previous ruling of the court in *State* v. *Kentner, supra,* which the court described as "a case exactly like the present one." In fact the defendant in the Christopher case conceded that the course of business pursued constituted a violation of the Missouri Bucket Shop Law, unless that law with respect to the transactions there shown was annulled or superseded by the said Grain Futures Act. This phase of the case we shall discuss later.

Smith v. *Bailey,* 200 Mo. App. 627, 209 S. W. 945, holds that the intent of either of the parties to the buying and selling of commodities for future delivery to speculate on the rise and fall of the market is sufficient to render and does render contracts therefor absolutely void under the Missouri Bucket Shop Law, even to the point that the broker who is ignorant of the intention of his principal to gamble cannot collect his broker's commission for his part in the speculation. The court said at page 635:

> "However, it was not necessary for plaintiffs to have known of defendant's intention to gamble in order that the demand sued for be not recoverable. The contracts, as we have already stated, were void, although it may have been the intention of only one of the parties to the contract to gamble. It is held that such contracts are void in the hands of a person who is a party to them even though he acted in ignorance of the

fact that the delivery of the commodity purchased or sold was not intended."

See also:

Elmore-Schultz Grain Co. v. *Stonebraker,* 202 Mo. App. 81, 214 S. W. 216.

Stewart v. *Hutchinson,* 120 Mo. App. 32, l. c. 36, 96 S. W. 253.

Connor v. *Black,* 119 Mo. 126, l. c. 141, 24 S. W. 184.

Atwater v. *Brokerage Co.,* 147 Mo. App. 436, 126 S. W. 823.

Woolfolk v. *Duncan,* 80 Mo. App. 421.

McVean v. *Wehmeier,* 215 Mo. App. 587, 256 S. W. 1085.

The Missouri Bucket Shop Law provides (Section 4325, R. S. Mo. 1929), and the foregoing cases plainly hold that even though but one party to the transaction intends to speculate on the rise and fall of the market, nevertheless that intent infects the entire transaction and renders the contract void both as to the broker and as to the customer.

All of the transactions between these petitioners and respondent occurred in Missouri, whatever respondent may or may not have done after it received petitioners' orders for the purported sale and purchase of grain. Consequently, under the express terms of the law the violation of the law occurred in Missouri. The offense of maintaining a bucket shop within the meaning of Sections 4316 and 4317, R. S. Mo. 1929, necessarily occurred in Carrollton, Missouri.

Moreover, Section 4318, R. S. Mo. 1929, reads:

> "All pretended purchases and sales or contracts and agreements for the pretended purchase and sale of the commodities, aforesaid, in manner aforesaid, wherein there is, in fact, no actual purchase and sale or sale and purchase of such commodities for or on account of the party or parties thereto, are hereby declared gambling and criminal acts, whether the order or contract for the pretended purchase or sale of such property purports to be offered, accepted, executed or consummated in this state or in any other state or country: *Provided*, the offer to make such pretended purchase or sale of said property is placed or given or communicated from this state; and any person violating the provisions of this section shall be guilty of a felony (R. S. 1919, Sec. 3566)."

Under this section all that is necessary to brand the transaction as a gambling and criminal act is that the offer to make a pretended sale or purchase be given or communicated from this state. Here it is admitted by both parties that the offer to make the pretended purchases and pretended sales involved in this case were all made at Carrollton, Missouri.

Consequently, the transactions shown in evidence were void—first, because they arose from the keeping and operating of a bucket shop in Carrollton within the meaning of the statute, and second, because the transactions were gambling transactions within the terms of the Bucket Shop Law without regard to whether or not orders were transmitted by respondent to contract markets beyond the state.

II.

The transactions shown in evidence are illegal and void at common law irrespective of the Missouri Bucket Shop Law.

In *Irwin* v. *Williar,* 110 U. S. 499, 28 L. Ed. 225, this court stated the rule constituting the test whether a purchase or sale for future delivery is a gambling transaction as follows, l. c. 508:

> "The generally accepted doctrine in this country is, as stated by Mr. Benjamin, that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them; but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and, if under guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void. And this is now the law in England by force of the statute of 8 & 9 Vict., c. 109, s. 18, altering the common law in that respect. Benjamin on Sales, Secs. 541, 542, and notes to 4th Am. Ed. by Bennett."

The court also in that case approved the portion of the charge of the trial court to the jury reading as follows, l. c. 508:

> "If, however, at the time of entering into a contract for a sale of personal property for future

> delivery it be contemplated by both parties that at the time fixed for delivery the purchaser shall merely receive or pay the difference between the contract and the market price, the transaction is a wager, and nothing more. It makes no difference that a bet or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade."

In *Embry* v. *Jemison*, 131 U. S. 336, 33 L. Ed. 172, the action was upon certain notes given to secure balances due a broker. The defendant filed a plea of *nil debet* and also filed a special plea of wager setting up that he had contracted with the brokerage firm, of which the plaintiff was a partner, to purchase cotton for him on a margin; that the notes were given to plaintiff to secure this margin account and that the purchase or delivery of actual cotton was never contemplated either by plaintiff or defendant—

> "And it was understood between them that the settlement was to be made between said parties by one party paying to the other the difference between the contract price and the market price of said cotton futures, according to the fluctuations in the market;
>
> And, therefore, the defendant says that the said contract was a wagering contract and that it and the said four notes for the consideration aforesaid are void and of no force in law" (l. c. 338).

A demurrer was sustained to this plea below and the case was tried on the plea of *nil debet*. A verdict and judgment was given for plaintiff and on writ of error this court held that the court below erred in sustain-

ing the demurrer to defendant's special plea of wager and said l. c. 349:

> "We are of the opinion that the special plea of wager presented a good defense to the action and ought not to have been rejected."

The court further held that the fact that defendant had executed notes gave plaintiff no greater right of recovery than he would have had had no notes been given. The court relied on and quoted from *Irwin* v. *Williar, supra,* and *Roundtree* v. *Smith,* 108 U. S. 269.

The question was raised whether the transaction was illegal under the New York statute or the Virginia statute relating to gambling and wagering contracts. The court held that it was immaterial which law governed because the defense pleaded was good under the law of either state. The court said at page 344:

> "If this be not a wagering contract, under the guise of a contract of sale, it would be difficult to imagine one that would be of that character. The mere form of the transaction is of little consequence. If it were, the statute against wagers could easily be evaded. The essential inquiry in every case is as to the necessary effect of the contract and the real intention of the parties."

And further quoted from Benjamin on Sales to the same effect as the statement of this court in *Irwin* v. *Williar, supra.*

Clews v. *Jamieson,* 182 U. S. 461, 45 L. Ed. 1183, announces the same principle as *Irwin* v. *Williar, supra,* and *Embry* v. *Jemison, supra,* but the court

there found the plaintiff was entitled to recover because the defendant had not sustained the burden of proving that no actual delivery of the commodities purchased was contemplated by the parties. For additional cases defining a wagering contract,

See:

Gettys v. *Newberger,* 272 Fed. 209, (C. C. A. 8th), l. c. 217.
James v. *Clement,* 223 Fed. 385 (C. C. A. 5th).
Riordon v. *McCabe,* 173 N. E. 660, (Ill.).
Fenner v. *Boykin,* 3 Fed. (2d) 674, l. c. 684 (D. C. N. D. Ga.), Aff. 271 U. S. 240.

The evidence shows that respondent knew that in the approximately eight months these alleged transactions were being carried on, out of the millions of bushels of grain pretended to be dealt in, not a single bushel was delivered nor was delivery requested by either party, and, in addition, all of the petitioners testified that delivery never was intended by either party. They testified that they expressly told respondent that they would not and could not accept delivery; that they were financially unable to pay for the grain which they purported to buy or to deliver the grain which they purported to sell, and that McDonough expressly assured them that they would not have to accept delivery of any of the grain they dealt in (R. 154-158). McDonough's knowledge of the intent of these customers, McDonough's close contact with these customers, and his advice to them clearly showed that he knew what was in their minds; that he knew they were dealing in the fluctuations of the

markets without any intention of making or accepting delivery. His knowledge was the knowledge of respondent (see *James* v. *Clement,* 223 Fed. 385, l. c. 395; *Wright-Blodgett Company* v. *United States,* 236 U. S. 397). That respondent knew that petitioners as well as its other customers at Carrollton were gambling and speculating on the rise and fall of grain and that respondent itself took the other side of the deal as found by the trial court is forcibly shown by the letters it wrote to its customer, R. A. Thompson, which we here reproduce from the transcript (R. 153). The letter to Mr. Thompson is as follows:

> "We had a conversation this morning with Mr. McDonough and we believe that the proper thing to do is gradually reduce this Winnipeg November-Chicago December spread, and unless we hear from you to the contrary, we will reduce yours gradually, and do the very best we can for you.
>
> We are certainly awfully sorry that we got off so badly on this spread, and it is really the first bad one we have had since we have been in business.
>
> I still think that there is a good chance for improvement, and this spread only worked this way on account of manipulation in Winnipeg. But it is dangerous to wait until the last day, so for this reason, we recommend that you reduce it gradually.
>
> Therefore, as stated above, we shall handle this for you the best we can, unless we hear from you to the contrary, and Mr. McDonough will keep you fully posted."

And the letter also addressed to petitioner, I. N. Calvert, which is as follows (R. 153):

"Mr. I. N. Calvert, Carrollton, Missouri.

Dear Sir:

Hereto attached please find statement of your account which explains itself. We are, of course, awfully sorry that this Winnipeg spread turned out so badly but assure you that we have given you at all times the very best advice we had. Would appreciate it if you would mail us a check upon receipt of this letter for this amount or if you cannot pay it all at once, write us how you can pay us and you will find us very reasonable about it.

In other words, we want to continue to do business with you and we feel sure that we can help you make it back. If you want to make arrangements with us to pay a certain amount each month we shall be glad to handle the account in this manner for you provided you make a part payment upon receipt of this letter.

Respectfully yours,

Uhlmann Grain Company,
By Paul Uhlmann."

The advice given in these letters shows respondent's knowledge of the character of the deals. Not only that but it shows that respondent had full notice and knowledge that no delivery was intended and most certainly shows the financial inability of these parties to carry on such enormous transactions as respondent was carrying on with its Carrollton customers.

What evidence is sufficient to impart notice to a broker that his customers are engaging merely in wagering transactions is indicated in the opinion of the court in *James* v. *Clement,* 223 Fed. 385, l. c. 397, where the following quotation from *Williamson* v. *Majors,* 169 Fed. 754, l. c. 762, is adopted and approved:

> "From what has been recited, it is clear that, in his buying and selling cotton futures, Williamson, who was in the real estate business and not in the cotton business, had no intention to actually buy or sell cotton, but was merely speculating on the rise and fall of the cotton market, intending to settle by receiving or paying differences, in fact, gambling in cotton futures, and it seems clear that Bettis Majors knew all about it. Certainly, from a mere inspection of Williamson's orders, he ought to have known it. Under the evidence, to assume his ignorance of Williamson's gambling would be a reflection on his intelligence. Knowing the nature of Williamson's dealings in cotton futures, he facilitated, if not encouraged him, furnished credit and money to carry on the same, and, finally, took the transactions off his hands by 'closing out' as to Williamson and 'taking them over' to himself."

On the general principle that such transactions are gambling transactions and void at common law, see *McDaniel* v. *Tullis Craig Company,* 11 S. W. (2d) 203 (Texas). This was a suit to recover on two notes, one for $7,250.00 and the other for $3,500.00. The $3,500.00 note was given for advances made in cotton deals, that is, dealing in cotton futures. A large amount of cotton was dealt in. Not a single bale was

delivered. The decision was by the Court of Civil Appeals of the State of Texas. In deciding the case the court commented on this failure to deliver as follows, l. c. 205:

> "It is significant that out of that vast number of customers or 'traders' as they were diplomatically called, not one of them ever wanted or asked for the cotton he had bought. The reason is apparent, no one had imagined for a moment that the cotton being dealt with had any existence so far as the parties were concerned. It was evidently not a sale of cotton, but a wager that cotton would rise or fall in price. Of course, there was no express agreement, orally or in writing, that no cotton was to be delivered, no more than there is an agreement that the game is one of chance when money is put into a roulette wheel. It did not require a positive agreement that no cotton should be handled—no one was so simple or uninformed as to require such an agreement. Doubtless if the cotton had been demanded by a customer it would have been delivered, as a matter of self-defense but the brokers were comfortable in the assurance that no such demand would ever be made. It was never dreamed by anyone that actual delivery was ever contemplated and no one, broker or trader, ever so understood it. It is held in the case of *Clews* v. *Jamieson*, 182 U. S. 461, 21 S. Ct. 845, 45 L. Ed. 1183:
>
> 'In order to invalidate a contract as a wagering one, both parties must intend that instead of delivery of the article there shall be a mere payment of the difference between the contract and the market price.' "

All of the facts in this case tend to show that such intention existed in the minds of all the parties to the transactions here.

Then after reciting the rule announced in the case of *Seeligson* v. *Lewis,* 65 Texas 215, and approved by the Supreme Court of the United States in *Irwin* v. *Williar,* 110 U. S. 499, to the effect that a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer, and that if under the guise of such a contract the real intention is merely to speculate on the rise and fall of the prices, then the contract is invalid, the court said:

> "The facts bring this case clearly within the transaction described in the cited cases, which will invalidate any contract made under the terms described. The cases are all in full accord on the subject. *Embrey* v. *Jemison,* 131 U. S. 336, S. Ct. 776, 33 L. Ed. 172; *Floyd* v. *Patterson,* 72 Tex. 202, 10 S. W. 526, 13 Am. St. Rep. 787; *Oliphant* v. *Markham,* 79 Texas 543, 15 S. W. 569, 23 Am. St. Rep. 363; *Logan* v. *Norris,* 100 Tex. 228, 97 S. W. 820; *Lovejoy* v. *Kaufman,* 16 Tex. Civ. App. 577, 41 S. W. 507; *Kenedy Mercantile Co.* v. *Ainsworth,* (Tex. Civ. App.) 258 S. W. 205. No attention seemed to have been paid to the financial ability of customers to pay for cotton whose values ran into thousands of dollars, but anyone was accepted as a customer who could deposit a margin."

The last part of the above quoted paragraph exactly fits the facts in this case because in this case, as in that, no, or very little, attention was paid to the

financial condition of respondent's Carrollton customers.

On the question whether the form of the contract is conclusive and binding as evidencing a valid and legal contract, that court in harmony with the decision of the Missouri Supreme Court in the case of *State* v. *Christopher,* heretofore cited, said:

> "As said by this court in Kenedy Mercantile Co. vs. Ainsworth, herein cited: 'The form of the contract cannot be conclusive as to the true character of the transaction, and need not be given great importance. If it can be deduced from the affair, no matter how ingeniously * * * concealed under the guise and mask of an innocent contract, that an illegal agreement was being covered up, the contract should be declared illegal and void.'"

The common law rule respecting wagers in stocks and grain is also stated in these Missouri cases: *McVean* v. *Wehmeier,* 256 S. W. 1085 (Mo. App.) l. c. 1087, and *Edwards Brokerage Co.* v. *Stevenson,* 160 Mo. 516, 61 S. W. 617. *Elmore-Schultz Grain Company* v. *Stonebraker,* 202 Mo. App. 81, 214 S. W. 216.

It is respectfully submitted that under the undisputed testimony in the record and the very nature of the dealings between these parties the authorities above cited brand the transactions shown by this record as wagering and gambling transactions, and render them void and unenforcible between these parties.

III.

The Federal Grain Futures Act does not supersede the Missouri Bucket Shop Law or legalize wagering transactions which were theretofore illegal at common law.

A. The Right to Enact Legislation Restricting Gambling in Grain Futures Is Within the Police Power of the State of Missouri.

Congress by the enactment of the Grain Futures Act did not take from the states their police power to adopt such legislation as would promote the public convenience, general prosperity, and public morals, which had theretofore existed.

House v. *Mayes*, 219 U. S. 270, 55 L. Ed. 213.
C. B. & Q. Ry. Co. v. *Illinois*, 200 U. S. 561, 50 L. Ed. 596.
Booth v. *Illinois*, 184 U. S. 425, 46 L. Ed. 623.

B. The Missouri Bucket Shop Law Does Not Affect Interstate Commerce But Affects Only Acts Committed in Missouri, Which the Federal Grain Futures Act Does Not and Cannot Regulate.

The Missouri Bucket Shop Law has been interpreted by the Missouri Supreme Court in *State* v. *Christopher*, 318 Mo. 225, 2 S. W. (2d) 621 (*supra*). The court, in pointing out that there was no conflict between the purpose and scope of the Missouri Bucket Shop Law and the Federal Grain Futures Act said, page 629 of 2 S. W. (2d):

> "The transactions permitted at defendant's place, described in the stipulation, have nothing

to do with interstate commerce. Nothing is said about the shipment across the state line of any grain, the subject of the so-called purchases. The only feature of any of those transactions which comes within the control of Congress is the 'confirmation' of a purchase sent 'by mail' from Kansas City to Sedalia. It may be argued that such confirmations by mail are forbidden by the act. But the Missouri statute does not declare such a confirmation unlawful, nor attempt to deal with it at all. *The statute forbids the keeping of a place where deals, thus later confirmed, were entered into in the first place.* A state law may prohibit the printing and sale of obscene literature. That does not interfere or conflict with the act of Congress forbidding the transmission of such literature through the mails. The production of the objectionable matter is one act, of which the state has control. The transportation through the mails is another act under the jurisdiction of Congress. So here, the bogus sale of grain at Sedalia is not forbidden by the act, which could apply only to the confirmation of it by mail. Such confirmation by messenger or by telephone or telegraph could not be covered by the act. * * * Further, in order to sustain the position of defendant we must hold that whatever trading the act has not forbidden it has made lawful, whether such trading occurs on a contract market or elsewhere, whether it affects interstate commerce or not. For counsel present this bald argument: 'In effect, the Missouri statute prohibits future trading as it is now carried on pursuant to the authorization of the Secretary of Agriculture. This presents the question whether Missouri may prohibit what the Secretary of Agriculture may authorize.' That is, Missouri cannot prevent grain gambling in Sedalia because the Secretary of Agriculture has designated a place in Kansas City where it is forbidden. Mis-

souri is powerless to prevent bucket shop gambling anywhere within its borders, and that kind of trading, everywhere recognized as evil in its effects, can flourish unmolested over the state because Congress regulates it in Kansas City and has not seen fit to forbid it elsewhere. * * * The authority of the state under its police power to enact and enforce regulations which it deems necessary for the welfare of its citizens, even though such regulations incidentally affect interstate commerce, unless direct specific legislation of Congress covers the exact subject, is recognized by the United States Supreme Court. *Mo. Pac. R. Co.* v. *Larabee Mills*, 211 U. S. loc. cit. 623, 29 S. Ct. 214, 53 L. Ed. 352; *Southern R. Co. Co.* v. *Reid*, 222 U. S. 437, 32 S. Ct. 140, 56 L. Ed. 257; *M. K. & T. R. Co.* v. *Harris*, 234 U. S. loc. cit. 417, 34 S. Ct. 790, 58 L. Ed. 1377, L. R. A. 1915E, 942. Such as punishment by a state for forgery of a promissory note payable to a national bank. *Cross* v. *North Carolina*, 132 U. S. loc. cit. 139, 10 S. Ct. 47, 33 L. Ed. 287" (italics ours).

In *C. A. King & Company* v. *Horton*, 156 N. E. 124 (Ohio), the facts were that C. A. King & Company did a brokerage business at Bryan in the State of Ohio having its principal office at Toledo. The suit was to recover on notes which Horton had given King & Company in connection with grain transactions in which King & Company acted as broker. The dealing was marginal dealing in the sale and purchase of grain on the Toledo and other exchanges. Horton was to keep on deposit a margin of 10¢ per bushel on all grain bought or sold, except when defendant had an equal amount bought or sold then the amount of the deposit was to be 2½¢ per bushel. As com-

pensation for its service King & Company was to have 1/8 of 1¢ per bushel. King & Company reserved the right whenever margins were running out, without notice, to close the transactions.

The judgment rendered by the trial court was appealed to the Supreme Court of Ohio. One of the contentions was that the Bucket Shop and Anti-Grain Gambling Laws of Ohio did not apply because of the Grain Futures Act. In a lengthy and elaborate discussion the Supreme Court of Ohio held that the Grain Futures Act in no sense and in no way whatever repealed, annulled, or destroyed the Bucket Shop Laws of Ohio or those laws of that state which prohibited gambling in grain.

After this case was affirmed by the Supreme Court of Ohio a writ of error was sought from this court. This was denied on the ground that "the only federal questions presented are frivolous" (see 48 Sup. Ct. Rep. 322).

On the question whether the transactions in *King* v. *Horton,* constituted interstate commerce, the Ohio court said, page 128:

> "In logical sequence we should next inquire whether these transactions were in interstate commerce.
>
> "Much of the grain grown in this country is moved in interstate commerce, and it is not material to inquire what proportion is so moved, or what amount is held in storage in the so-called contract markets. It is quite certain that an enormous volume of grain is consumed within the state where it is grown. Intrastate transac-

> tions in grain which is never transported across state lines is no part of interstate commerce, and such transactions cannot be lawfully defined as interstate commerce by congressional fiat. The broad declarations of Section 3 of the Grain Futures Act (Section 5668c, Barnes' Fed. Code, U. S. Comp. St. 8747 4/5b) are purely political and in no sense legislative. Those declarations add nothing to the act except in so far as the act commands greater respect, because they indicate that Congress has made a thorough investigation of the subject. It must, however, still be accepted as axiomatic that whatever 'national public interest' attaches to transactions known as 'futures' rests wholly upon fact, and to no extent upon congressional fiat. Transactions relating to future delivery of grain, in which the parties clearly do not intend delivery, and where possible delivery as a last resort would involve only a transfer of a warehouse certificate, would seem to be so far removed from any just notions of interstate commerce that no citation of authorities should be necessary, and yet we are not without authorities."

This precise question was before this court in the case of *Ware and Leland* v. *Mobile County*, 209 U. S. 405. There the State of Alabama passed a law providing that every person engaged in buying and selling stocks for speculation or on commission for themselves or others, and each place of business known as a cotton exchange or stock exchange or bucket shop, should pay a license tax of $500.00 in any town over 20,000 inhabitants and in other towns $250.00. The tax was resisted by Ware and Leland, cotton brokers maintaining an office in Mobile and offices in New York, New Orleans and Chicago. They

were engaged at Mobile in buying and selling cotton for future delivery on commission. It was not usual in their business when futures were bought or sold to discuss the subject of delivery. The transactions described there resembled in a general way the transactions in evidence here. This court, by Mr. Justice Day, said, page 409:

> "The sole question here presented is, whether the statute in question is an attempt to regulate interstate commerce, for if the plaintiffs in error are shown by the foregoing agreed facts to be engaged in interstate commerce then the statute is void, as an attempt by a State to regulate the commerce which the Constitution of the United States places within the exclusive control of Federal authority."

This court, after discussing the pertinent authorities, said, page 412:

> "The appellants are brokers who take orders and transmit them to other States for the purchase and sale of grain or cotton upon speculation. They are, in no just sense, common carriers of messages, as are the telegraph companies. For that part of the transactions, merely speculative and followed by no actual delivery, it cannot be fairly contended that such contracts are the subject of interstate commerce; and concerning such of the contracts for purchases for future delivery, as result in actual delivery of the grain or cotton, the stipulated facts show that when the orders transmitted are received in the foreign State the property is bought in that State and there held for

the purchaser. The transaction was thus closed by a contract completed and executed in the foreign State, although the orders were received from another State. When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one State to the place of delivery in another State. And though it is stipulated that shipments were made from Alabama to the foreign State in some instances, that was not because of any contractual obligation so to do. In neither class of contracts, for sale or purchase, was there necessarily any movement of commodities in interstate traffic, because of the contracts made by the brokers.

"These contracts are not, therefore, the subjects of interstate commerce, any more than in the insurance cases, where the policies are ordered and delivered in another State than that of the residence and office of the company. The delivery, when one was made, was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce."

Thus even if it had been shown in the present case that the parties in some instances contemplated the actual purchase and the actual delivery of grain as a result of the transactions shown in evidence, still under *Ware and Leland* v. *Mobile County, supra,* the transactions would not have constituted interstate

commerce. How much less are they so where it is shown that in no instance did the parties contemplate an actual delivery of the grain and in no instance was grain actually delivered.

In *Hill* v. *Wallace*, 259 U. S. 44, the validity of the Future Trading Act passed by Congress was attacked. The Act imposed a tax of 20¢ a bushel upon all contracts for the sale of grain for future delivery, except sales on Boards of Trade designated as contract markets by the Secretary of Agriculture. The grounds of attack material here were: first, that the Act violated the Tenth Amendment to the Constitution by interfering with the right of the State of Illinois to regulate the maintenance of grain exchanges within its borders; and second, that the Act was an attempt to regulate commerce which was intrastate, not interstate. This court held the Act in part to be invalid under the Tenth Amendment because it was an attempt, under the guise of a tax, to compel Boards of Trade to comply with regulations, many of which had no relevancy to the collection of the tax. The court further held that there was nothing in the Act to limit its application to interstate commerce and that under the authority of *Ware and Leland* v. *Mobile County, supra,* (l. c. 69), "It follows that sales for future delivery on the board of trade are not in and of themselves interstate commerce. They cannot come within the regulatory power of Congress as such, unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate

commerce so as to be an obstruction or a burden thereon."

We believe this issue is concluded by the ruling of the District Court for the Northern District of Georgia in the case of *Fenner, et al.* v. *Boykin,* 3 Fed. (2d) 674, three judges sitting, which was affirmed by this court in 271 U. S. 240. The facts and the opinion below are discussed briefly on page 19 of our supporting brief on this petition for a writ of certiorari. The court below in that case expressly held that the transactions there involved, which were almost precisely similar to those shown by the evidence here, were gambling transactions and that if they were interstate transactions they constituted not interstate commerce but interstate gambling, so that they were not subject to any limitation imposed by the Federal Grain Futures Act but were freely subject to the regulatory provisions of the Georgia Law, which closely resemble those of the Missouri law in the respects here in question.

If we have read the foregoing authorities aright, then it is plain that with respect to the transactions here shown in evidence the Missouri statute is fully enforcible, and that contrary to the ruling of the Circuit Court of Appeals for the Eighth Circuit in this case, the Grain Futures Act does not in any sense supersede or lessen the effect of the applicable provisions of the Missouri Bucket Shop Law. It necessarily follows that the Circuit Court of Appeals for the Eighth Circuit erred in its conclusion upon the merits and erred in reversing the judgment and finding below.

IV.

The findings of facts of the trial court numbered ten and eleven that the transactions between petitioners and respondent were fictitious transactions and that respondent bet with petitioners in those transactions, had the same effect as a verdict of the jury, and the Circuit Court of Appeals for the Eighth Circuit had no right to set its findings aside under the evidence in this record.

The alleged sale confirmations were not binding on the trial court. Neither was the spoken testimony of respondent's witnesses. It was the province of the trial court to weigh the evidence from all angles; to take into consideration all of the circumstances detailed in evidence, such as the financial ability of petitioners to meet the obligations they purported to incur, their ability or inability to receive, store and care for the large volume of grain which they purported to purchase, the nature of their occupations, the large amount of grain, the activity of respondent's agent, Mr. McDonough, in soliciting accounts from all classes of citizens regardless of their financial ability to make their obligations good, and the very nature of the dealings in all of their phases.

Fenner v. *Boykin*, 3 Fed. (2d) 674; Aff. 271 U. S. 240.

Irwin v. *Williar*, 110 U. S. 499, 28 L. Ed. 225.

State v. *Christopher*, 318 Mo. 225, 2 S. W. (2d) 621.

Riordon v. *McCabe*, 173 N. E. 660 (Ill.).

McDaniel v. *Tullis Craig Co.*, 11 S. W. (2d) 205 (Texas).

V.

Respondent's reply below to petitioners' answer pleaded that the transactions upon which the right of recovery was based occurred on the Chicago and Minneapolis Boards of Trade in pursuance of, and in compliance with, the Federal Grain Futures Act. Respondent's evidence failed to make good its reply and the trial court properly found for petitioners upon the defense pleaded in their answer, even if the Grain Futures Act superseded the Missouri Bucket Show Law with respect to interstate transactions.

Respondent's evidence was that part of the transactions in grain purported to be executed on the Chicago Board of Trade, part of the Minneapolis Board of Trade, part on the Winnipeg Grain Exchange, and a considerable part in "spreads" between the Chicago and Winnipeg exchanges (R. 58, 69, 72, 154, 161, 164). The Winnipeg Grain Exchange is, of course, not a contract market designated by the Secretary of Agriculture within the provision of the Grain Futures Act in Sections 6 and 7, Title 7, U. S. C. Ann., page 10 (R. 72). It cannot be questioned that under Sections 6 and 7 trading such as respondent claims it carried on with petitioners is unlawful unless it is conducted on a contract market designated by the Secretary of Agriculture. Consequently, even under the Grain Futures Act those transactions which were claimed to have been carried on upon the Winnipeg Grain Exchange were necessarily unlawful.

Respondent did not, however, segregate or attempt to segregate its alleged Winnipeg transactions from

those it claimed were carried on at Minneapolis and Chicago. Under its reply, the burden was on it to do so. All of the transactions are, in the testimony, dealt with and treated upon the same basis. Hence if some are illegal, all are illegal.

Moreover, even those transactions which respondent's reply below alleged were consummated on the Chicago and Minneapolis Boards of Trade, are not shown to have been consummated in the manner required by the Grain Futures Act, Section 6, Chapter I, Title 7, U. S. Code Ann., page 9, which reads as follows:

> "6. *Prohibition against dealings in grain futures; general exceptions.* It shall be unlawful for any person to deliver for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication any offer to make or execute, or any confirmation of the execution of, or any quotation or report of the price of, any contract of sale of grain for future delivery on or subject to the rules of any board of trade in the United States, or for any person to make or execute such contract of sale, which is or may be used for (a) hedging any transaction in interstate commerce in grain or the products or by-products thereof, or (b) determining the price basis of any such transaction in interstate commerce, or (c) delivering grain sold, shipped, or received in interstate commerce for the fulfillment thereof, except—
>
> (a) Where the seller is at the time of the making of such contract the owner of the actual physical property covered thereby, or is the grower thereof, or in case either party to the contract is the owner or renter of land on which the same is

to be grown, or is an association of such owners, or growers of grain, or of such owners or renters of land; or

(b) Where such contract is made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a 'contract market,' as hereinafter provided in this chapter, and if such contract is evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery: Provided, That each board member shall keep such record for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, which record shall at all times be open to the inspection of any representative of the United States Department of Agriculture or the United States Department of Justice (Sept. 21, 1922, c. 369, Sec. 4, 42 Stat. 999)."

Under this section, the transactions claimed by respondent to have occurred on the Chicago and Minneapolis Boards of Trade are only lawful where "such contract is evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery."

Not in a single instance did this respondent show an actual transaction involving any one of the petitioners herein on either the Minneapolis or the Chicago Boards of Trade, or for that matter on the Winnipeg Exchange. No records in writing were produced by respondent at the trial showing any such transactions

with petitioners. Nor was there a line of testimony indicating that the names of the parties to any such contracts or their addresses had been preserved or were known, much less that they were embodied in the form of a written agreement.

Consequently, it may be said categorically that respondent did not show by any testimony in the record that a single one of all of the numerous transactions in which it claimed to have bought and sold grain on behalf of these petitioners ever was consummated on any exchange in a proper and lawful manner. It necessarily follows, therefore, that whether or not the Grain Futures Act in any particular supersedes or repeals the Missouri Bucket Shop Law, and whether or not such transactions if carried on between Carrollton and the Chicago and Minneapolis Boards of Trade constitute interstate commerce, none of the transactions shown in evidence was lawfully consummated and the trial court was right in finding in favor of petitioners. This question the Circuit Court of Appeals for the Eighth Circuit did not pass upon.

Conclusion.

It is respectfully submitted that the transactions shown in evidence in this case clearly violated the Missouri Bucket Shop Law; that they went further than that and were void as common law gambling; that the transactions rendered void by the Missouri statute were not interstate commerce; that the Missouri Bucket Shop Law is not in any sense superseded, in the respects in which it is applied in this case, by the

Federal Grain Futures Act; that the trial court was right in its finding below in favor of these petitioners and that the judgment herein of the Circuit Court of Appeals for the Eighth Circuit should be reversed.

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